

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 9, 2001 Session

IN RE: C.M. b/n/f DANIEL DORIAN McDANIEL v. RICK PHILLIPS

**Direct Appeal from the Circuit Court for Knox County
No. 86063 Hon. Bill Swann, Circuit Judge**

FILED AUGUST 15, 2001

No. E2001-00211-COA-R3-CV

The Trial Court subjected defendant to a protective order pursuant to Tenn. Code Ann. §36-3-601 *et seq.* Defendant claimed a portion of the statute was unconstitutional, the Court lacked subject matter jurisdiction, and the evidence did not establish a basis to issue the Order. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Stanley F. LaDuke, Knoxville, Tennessee, for Appellant.

Cecilia S. Petersen, Knoxville, Tennessee, for Appellees.

Paul G. Summers, Attorney General and Reporter, and Elizabeth C. Driver, Assistant Attorney, General, Nashville, Tennessee, in defense of Tenn. Code Ann. §36-3-617.

OPINION

On August 31, 2000, the Trial Court entered an Order of Protection for the minor plaintiff against defendant. The Order provided that defendant was “enjoined from coming about the petitioner for any purpose, and specifically from abusing, threatening to abuse petitioner, or committing any acts of violence upon the petitioner on the penalty of contempt.” The Court also ordered the defendant to pay petitioner’s attorney’s fees in the amount of \$400.00.

Defendant has appealed, raising numerous issues which we condense as follows:

1. Whether Tenn. Code. Ann. §36-3-617 is constitutional under the separation of powers provision of Article 2, §§1 and 2 of the Tennessee Constitution?
2. Whether the Circuit Court has jurisdiction over petitions for orders of protection filed on behalf of minors?
3. Whether a minor is required to participate in the drafting and prosecution of a petition for an order of protection?
4. Whether the evidence preponderates against the factual determinations made by the Trial Court that plaintiff had established a basis for the order of protection?

From the summary of the evidence prepared by the Trial Court, we find that Daniel McDaniel is the father and Lisa McDaniel is the mother of two children, C.M., who was 14 years old at the time of the alleged abuse, and S.M., who was 11 years old. The parents had been divorced and until August 1999, the children spent approximately half of the time with each parent. Daniel had remarried to Robin, and Lisa had been living with her boyfriend, the defendant since July of 1998, and continues in that relationship. The record shows that C.M. wanted to live with her father and step-mother, and disliked defendant, and the parents agreed that the girls would live with their father. A short time thereafter, C.M. visited her mother and left a letter for her mother to find. When the mother found the letter she was upset, and called the father and advised that she wanted to talk to C.M. and asked them to make sure she didn't leave.

After Lisa's call, Robin McDaniel told C.M. that her mother had called, was very upset and was coming over. At that point C.M. began crying hysterically and was sobbing and upset, and told Robin that defendant was a "meany-butt" and that she did not want him to go to jail but that he had fondled her breasts.

The father and step-mother then took both children to the Sexual Assault Crisis Center, and engaged the Department of Human Services. Both girls were placed in counseling, and Lisa promised the father that she would keep the defendant away from the children. Lisa testified that she had kept the defendant away from the children except for three or four hours the following year. During that time C.M. became a better adjusted and happier child. This petition was triggered when Lisa advised the father in August of 2000 that she wanted defendant around the girls and in the future they would be.

First, appellant contends that Tenn. Code Ann. §36-3-617 is unconstitutional, because the statute mandates under certain circumstances that "petitioner's court costs and attorney's fees shall be assessed against the respondent." He argues that this mandate unconstitutionally restricts the powers and the operation of the courts and should be struck down.

It is a function of the legislative branch to provide remedies to persons seeking

judicial relief. *See Cardill v. Foley*, 21 S.W.3d 203, 209 (Tenn. Ct. App. 1999). Our reading of the Statute does not reveal that it infringes upon the powers of the Courts guaranteed under the Constitution. Under this statute, the Court's discretion is not impaired, not its fact finding process, and the statute merely authorizes attorney's fees to be awarded to the petitioner under certain circumstances. We find no basis to hold this statute unconstitutional.

The defendant argues that the Circuit Court was without jurisdiction to entertain this matter because Juvenile Court has exclusive jurisdiction over dependency and neglect cases brought pursuant to Tenn. Code Ann. §37-1-103. The Trial Judge in this case proceeded under the authority of Tenn. Code Ann. §36-3-601 *et seq.* Tenn. Code Ann. §36-3-601(1) defines domestic abuse and (09) defines the victims of such abuse. The facts establish that petitioner falls within the ambit of this statute which is not in conflict with the jurisdiction of the Juvenile Court over dependent minors who are dependent or neglected.

We find this issue to be without merit.

Next, defendant asserts that the petition must be drafted by the minor and be supported by the minor's testimony. The defendant offers no authority for this position. The Rules of Civil Procedure provide that a minor may bring an action by next friend, and Tenn. Code Ann. §36-3-602(a) requires the parent or guardian to sign the petition for seeking an Order of Protection filed on behalf of the minor. This argument is also without merit.

On appeal, defendant asserts that the doctrine of laches should bar this action, because the evidence about the alleged abuse occurred a year before the trial of the case. The doctrine of laches was not expressly pled below, and we will not entertain an issue first raised on appeal.

Finally, defendant argues that the evidence does not establish a basis to issue the Order of Protection. The Trial Judge's finding comes to this Court with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. Rule 13(d). We conclude the evidence does not preponderate against the Trial Court's findings. The Trial Judge heard the testimony and weighed the credibility of the witnesses.

The defendant argues that the Trial Judge erred in admitting hearsay evidence, i.e., the admission of C.M.'s statement identifying defendant and his sexual misconduct. The Trial Judge admitted this testimony over the objection of the defendant on the grounds that it was an excited utterance.¹ We agree with the Trial Court. The case of *State v. Gordon*, 952 S.W.2d 817 (Tenn. 1997) is instructive on this issue. The Court said in that case at p. 820:

¹Tennessee Rules of Evidence 803 . . . (2) Excited Utterance - a statement relating to a startling event or condition made while declarant was under the stress of excitement caused by the event or condition.

First, there must be a startling event or condition. As noted in *Tennessee Law of Evidence*, the “possibilities are endless” because “any event deemed startling is sufficient.” *Id.*, §803(2).2 at 533. As another treatise has stated, the “event must be sufficiently startling to suspend the normal reflective thought processes of the declarant.” *McCormick on Evidence*, § 297 at 854 (3d. Ed. 1984). Although the “startling event” is usually the act or transaction upon which the legal controversy is based, such as an assault or accident, the exception is not limited to statements arising directly from such events; rather, a subsequent startling event or condition which is related to the prior event can produce an excited utterance. . . . (Citations omitted), (emphasis supplied).

The record in this case meets the requirements set forth in *Gordon*. C.M.’s statement relates to the startling event or condition and the statement was made while the declarant was under the stress or excitement from the event or condition. C.M. had left a letter for her mother to read, and upon learning of her mother’s reaction to the letter and the mother’s intended confrontation with her, she become hysterical, and her utterances during her hysterical state were properly admitted by the Trial Judge.

Taking into account the totality of the circumstances, including the failure of the defendant to testify, the evidence does not preponderate against the Trial Court’s finding that an order of protection was appropriate. We affirm the issuance of that Order. *See State ex rel Davis v. Kinett*, 177 S.W.2d 551 180-598 (1944).

The cost of the appeal is assessed to the appellant.

HERSCHEL PICKENS FRANKS, J.